**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

| | | |
|---|---|---|
| JIMMY WATSON JONES, | ) | |
| Appellant, | ) | **NOT FOR PUBLICATION** |
| v. | ) | Case No. F-2013-754 |
| STATE OF OKLAHOMA | ) | |
| Appellee. | ) | |

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 21 2015
MICHAEL S. RICHIE
CLERK

**SUMMARY OPINION**

**LUMPKIN, VICE PRESIDING JUDGE:**

Appellant Jimmy Watson Jones was tried by jury and convicted of Rape by Instrumentation Upon a Person Under the Age of Fourteen (21 O.S.2001, § 1114(A)(7)), Case No. CF-2012-174, in the District Court of LeFlore County. The jury recommended as punishment thirty (30) years imprisonment and a $10,000.00 fine. The trial court sentenced accordingly.[1] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. Improper admission of propensity evidence that was more lurid and shocking than the charge itself deprived Appellant of his fundamental right to a fair trial.

II. The trial court committed plain error by failing to give the Oklahoma Jury Instruction 9-20 advising the jury how to legally and properly consider prior inconsistent statements of the complainant as impeachment evidence impacting the credibility and believability of the State's main witness.

---

[1] Appellant must serve 85% of his sentence before becoming eligible for consideration for parole. 21 O.S. 2011, § 13.1.

III. The trial court failed to properly instruct the jury that Appellant would receive the additional punishment of Sex Offender Registration if found guilty by the jury's verdict in this case.

IV. Prosecutorial misconduct deprived Appellant of a fair trial, violated his constitutional rights, and created fundamental error in this case.

V. Appellant was prejudiced by ineffective assistance of counsel.

VI. The trial court discriminated against Appellant because of his indigence, depriving him of his rights to due process of law and a court of open justice without denial or sale.

VII. Appellant received an excessive sentence in this case.

VIII. The cumulative effect of all these errors deprived Appellant of a fair trial and warrants relief for Appellant.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that under the law and the evidence no relief is warranted.

In Proposition I, the trial court did not abuse its discretion in admitting the sexual propensity evidence. *See James v. State*, 2009 OK CR 8, ¶ 11, 204 P.2d 793, 798; *Horn v. State*, 2009 OK CR 7 ¶ 41, 204 P.3d 777, 786. Under 12 O.S.2011, § 2414, the evidence was admissible for any relevant purpose. The particulars of the prior sexual abuse suffered by witnesses McCormack and Summers showed a visible connection with the instant charge, and demonstrated a common scheme to take sexual advantage of very young girls

that were placed in Appellant's trust and care. More than once, the trial court cautioned the jury on the limited use of such evidence.

In Proposition II, we review the omission of Oklahoma Uniform Jury Instruction-Criminal 2d (OUJI-CR) 9-20 on prior inconsistent statements for plain error as the defense neither requested the instruction nor raised an objection to its absence, even after the trial court brought it to the attention of defense counsel. *See Eizember v. State*, 2007 OK CR 29, ¶ 110, 164 P.3d 208, 236. Under the test for plain error set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, an appellant must show an actual error, that is plain or obvious, affecting his substantial rights, and which seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*, 1994 OK CR 40, ¶ 10, 26, 30, 876 P.2d at 694, 699, 701. "[P]lain error is subject to harmless error analysis." *Id.*, 1994 OK CR 40, ¶ 20, 876 P.2d at 698. *See Levering v.* State, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Malone v. State*, 2013 OK CR 1, ¶ 41, 293 P.3d 198, 211-212.

The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. *Eizember*, 2007 OK CR 29, ¶ 111, 164 P.3d at 236. Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law. *Id.* Reading the instructions given in the present case in their entirety, the jury was repeatedly and adequately informed of their responsibility to determine the weight and credibility of each witness. *See* OUJI-CR 2d 1-8A. That the jury was not given the uniform instruction

specifically classifying inconsistent testimony as impeachment evidence does not warrant relief. On the record before us, the instructions adequately stated the applicable law, therefore the trial court did not abuse its discretion in omitting OUJI-CR 2d 9-20. Finding no abuse of discretion, we find no error and thus no plain error.

In Proposition III, we find the trial court did not abuse its discretion in rejecting Appellant's requested instruction on the Sex Offender Registration Act, 57 O.S.2011, § 582, as the jury instructions as a whole accurately stated the applicable law. *See Eizember*, 2007 OK CR 29, ¶ 111, 164 P.3d at 236. Sex offender registration is automatic upon conviction and is not for the jury's consideration. The Sex Offender Registration Act neither imposes criminal punishment nor constitutes a material consequence of sentencing.

In Proposition IV, when reviewing claims of prosecutorial misconduct, relief will be granted only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdict should not be relied upon. *Roy v. State,* 2006 OK CR 47,¶ 29, 152 P.3d 217, 227, *citing Donnelly v. DeChristoforo,* 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Mitchell v. State,* 2010 OK CR 14, ¶ 97, 235 P.3d 640, 661.

Here, we have reviewed Appellant's claims of prosecutorial misconduct for plain error and found none. *Malone,* 2013 OK CR 1, ¶ 40, 293 P.2d at 211. The comments in opening statement now challenged on appeal were an appropriate summary of the State's evidence. *See Ledbetter v. State,* 1997 OK CR 5, ¶ 76, 933 P.2d 880, 900-901 (the purpose of opening statement is to apprise the jury of the evidence the attorneys expect to present during trial, which is committed to the sound discretion of the trial court). The comments do not appear to have been made in bad faith and were not manifestly prejudicial. *See Ellis v. State,* 1982 OK CR 151, ¶ 16, 651 P.2d 1057, 1062 (error cannot be predicated upon the opening statement of a prosecutor unless such unsupported statements were made in bad faith and were manifestly prejudicial).

Further, the prosecutor's questioning of propensity witnesses McCormack and Summers was a reasonable and appropriate attempt to establish the reliability and credibility of their testimony concerning prior acts of abuse suffered over a decade earlier. In light of the similarities in the testimony of sexual abuse suffered by the propensity witnesses and the victim in this case, the prosecutor had to establish that McCormack's and Summers' testimony was not tailored to resemble T.R.'s accusations, but was based upon their own memories. Further, it was crucial for the State to show the jury how and why McCormack and Summers came to testify. The prosecutor's questions were simple and direct and do not appear designed to elicit emotional responses. That a prior sexual abuse victim would have harsh words for her attacker is not the fault of the prosecutor. Viewing the record in its entirety, any comments by the

witnesses regarding other potential victims were minimal and not so prejudicial as to warrant relief.

In Proposition V, we review Appellant's claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State*, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 *citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. *See also Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland*, the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, *i.e.*, an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode*, 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at ¶ 82, 236 P.3d at 686.

Appellant claims counsel was ineffective for failing to object to instances of prosecutorial misconduct raised in Proposition IV. In that proposition of error, we reviewed for plain error the prosecutor's challenged conduct and found no error and thus no plain error. As the merits underlying this portion of Appellant's claim of ineffectiveness have been addressed and rejected, Appellant cannot show any prejudice and his claim of ineffectiveness is denied. *See Eizember*, 2007 OK CR 29, ¶ 155, 164 P.3d at 244; *Frederick v. State*, 2001

OK CR 34, ¶ 189, 37 P.3d 908, 955; *Phillips v. State,* 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044 (all cases - trial counsel will not be found ineffective for failing to raise objections which would have been overruled).

Appellant also claims counsel was ineffective for failing to request the uniform jury instruction on prior inconsistent statements, OUJI-CR 2d 9-20. In Proposition II, we reviewed the absence of the uniform instruction for plain error. As the jury instructions as a whole adequately stated the applicable law, we found no error and thus no plain error in the omission of OUJI-CR 2d 9-20. On this record, Appellant has not shown that but for counsel's failure to request the instruction, the result of his trial would have been different.

Lastly, Appellant argues that trial counsel opened the door to evidence of prior threats and acts of physical abuse testified to by the propensity witnesses. This evidence had been ruled inadmissible prior to trial but when propensity witness McCormack referenced a prior act of physical abuse but said she was not allowed to talk about it, defense counsel acquiesced in the prosecutor's request to let the evidence in. McCormack, Summers and their mother all testified to threats and acts of physical abuse they suffered at the hands of Appellant.

*Strickland* provides that when a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. *Marshall,* 2010 OK CR 8, ¶ 61, 232 P.3d at 481. In *Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 791-792, 178 L.Ed.2d 624 (2011) the U.S. Supreme Court said:

> In assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect

> on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable. (internal citations omitted).

Here, Appellant has failed to show that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. T.R.'s testimony concerning the actual acts of molestation was clear and consistent. T.R. never testified she was physically abused by Appellant. The jury was thoroughly admonished, both verbally and in writing, on the limited use of the propensity evidence. The jury was also thoroughly instructed on the weight and credit to be given the witnesses' testimony and the State's burden of proof. In light of the strength of the evidence of the molestation of T.R., and the jury instructions, any testimony that the propensity witnesses suffered physical abuse did not impact the jury's finding of Appellant's guilt for the rape by instrumentation of T.R. Appellant has not shown that counsel's challenged conduct made the likelihood of a different result substantial.

In Proposition VI, Appellant contends his constitutional and statutory rights to due process were violated when, after having been determined indigent, the judge wrote on the order directing the preliminary hearing transcript be prepared at state expense, "no plea agreement will be accepted once public funds are expended for transcript." (O.R. 24). Appellant concedes the record is void of

any evidence of the potential for or existence of plea negotiations. Further, he does not show how he was prejudiced by the absence of plea negotiations. This Court has consistently held that it is not error alone that reverses the lower court's judgments, but error plus injury, and the burden is upon the appellant to establish the fact that he was prejudiced in his substantial rights by the commission of the alleged error. *Carpenter v. State,* 1996 OK CR 56, ¶ 17, 929 P.2d 988, 994; *Smallwood v. State,* 1995 OK CR 60, ¶ 29, 907 P.2d 217, 227; *Elmore v. State,* 1993 OK CR 1, ¶ 14, 846 P.2d 1120, 1123; *Edington v. State,* 1991 OK CR 21, ¶ 7, 806 P.2d 81, 83; *Cook v. State,* 1982 OK CR 131, ¶ 21, 650 P.2d 863, 868. While trial judges should not interfere with a defendant's right to seek a negotiated plea, Appellant has failed to meet that burden in this case.

In Proposition VII, we find Appellant's thirty year sentence is not excessive but appropriate based upon the facts and circumstances of the case. *See Rea v. State,* 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State,* 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291.

In Proposition VIII, we find Appellant was not denied a fair trial by the accumulation of error. *Lott v. State,* 2004 OK CR 27, ¶ 166, 98 P.3d 318, 357.

Accordingly, this appeal is denied.

**DECISION**

The Judgments and Sentences are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LEFLORE COUNTY
THE HONORABLE JONATHON K. SULLIVAN, DISTRICT JUDGE

**APPEARANCES AT TRIAL**

ROB COWAN
P.O. BOX 41
POTEAU, OK 74953
COUNSEL FOR DEFENDANT

JEFFREY SMITH
DISTRICT ATTORNEY
MARAGARET NICHOLSON
ASSISTANT DISTRICT ATTORNEY
P.O. BOX 880
POTEAU, OK 74593
COUNSEL FOR THE STATE

**APPEARANCES ON APPEAL**

VIRGINIA SANDERS
OKLAHOMA INDIGENT DEFENSE SYSTEM
P.O. 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
WILLIAM R. HOLMES
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

**OPINION BY: LUMPKIN, V.P.J.:**
SMITH, P.J.: Specially Concurs
JOHNSON, J.: Concurs in Results
LEWIS, J.: Concurs
HUDSON, J.: Concurs

RA

**SMITH, P.J., SPECIALLY CONCURRING:**

I concur in affirming the conviction in this case, but I continue to urge that juries be instructed that a defendant charged with a crime enumerated in 57 O.S. § 582 shall upon conviction be subject to the Sex Offenders Registration Act.